

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1333

STEPHEN ANTHONY LETTERI

vs.

JUDY KAY LETTERI.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Judy Kay Letteri (wife) appeals from an amended judgment of divorce nisi (amended judgment) issued by a Probate and Family Court judge on May 1, 2018.¹ The amended judgment followed a remand ordered by a different panel of this court (hereinafter, panel) in the prior appeal from the original judgment of divorce nisi (divorce judgment). See Letteri v. Letteri, 92 Mass. App. Ct. 1120 (2017). The wife challenges the property division in the amended judgment, asserting that it fails to conform to the panel's mandate in the prior appeal and results in an inequitable distribution of marital assets under G. L. c. 208, § 34. We affirm.

Background. The parties' long-term marriage came to an end on May 27, 2016. The divorce judgment (1) treated the husband's

¹ Nunc pro tunc to May 27, 2016.

pension, in payout status, as a stream of income rather than an asset subject to equitable division; (2) equally divided between the parties the wife's two 403(b) retirement plans; (3) assigned the wife the full value of her other Shriner's retirement plan; and (4) ordered the wife to pay child support to the husband of \$185 per week. The wife appealed from the divorce judgment, and in a decision dated December 28, 2017, the panel vacated so much of the judgment that excluded the husband's pension from the division of assets and remanded the case for a redistribution of the marital estate. See Letteri, 92 Mass. App. Ct. 1120. The question whether to revisit the issue of child support on remand was left to the judge's discretion. In vacating the property division, the panel concluded that, although the judge found the total marital estate should be divided equally, "'the financial arrangement as a whole shows that the evenhanded treatment was illusory,' because only the husband is capable of maintaining his standard of living after the divorce." Id., quoting Grubert v. Grubert, 20 Mass. App. Ct. 811, 817 (1985). To illustrate the disparity, the panel observed that the divorce judgment left the husband with a weekly net surplus of \$741 after deducting his expenses from income, whereas the wife was left with a weekly net deficit of \$320.²

² The husband's weekly surplus of \$741 was calculated by taking his weekly net income of \$1,848.15 (consisting of \$1,098 in

Following a nonevidentiary hearing and the parties' submission of proposed judgments on remand, the judge issued the amended judgment on May 1, 2018. The amended judgment included the husband's pension in the marital estate for purposes of G. L. c. 208, § 34, assigned one hundred percent of the husband's pension to the husband, and assigned one hundred percent of the wife's three retirement plans to the wife. In allowing the husband to retain his pension, the judge considered (1) the "substantial offset" received by the wife for her three retirement plans (which the judge found to "have a significant value," noting that their combined postdivorce value had increased to \$377,800); (2) the husband's liquidation of his other retirement assets, totaling \$116,650, to fund the parties' 2012 move to Massachusetts; and (3) the fact that the wife would not be required to pay alimony to the husband. The judge also found it unnecessary to revisit the issue of child support, as the parties had entered into a stipulation terminating the wife's child support obligation and requiring the husband to pay

pension income, \$673 in attributed income, and \$185 in child support, minus his reported deductions of \$107.85) and subtracting his reported weekly expenses of \$1,106.95. See Letteri, 92 Mass. App. Ct. 1120. The wife's weekly deficit of \$320 was calculated by taking her weekly net income of \$604.77 (consisting of \$1,170.40 in salary, minus her reported deductions of \$380.23 and child support obligation of \$185), and subtracting her reported weekly expenses of \$924.32. Id.

child support to the wife of \$130 per week. The present appeal by the wife followed.

Discussion. The wife argues that the judge failed to redistribute the marital estate equitably and in a manner consistent with the December 28, 2017 decision. We disagree.

"Under G. L. c. 208, § 34, judges possess broad discretion to divide marital property equitably." Dalessio v. Dalessio, 409 Mass. 821, 830 (1991), citing Pare v. Pare, 409 Mass. 292, 296 (1991). "Mathematical precision is not required of equitable division of property." Ross v. Ross, 50 Mass. App. Ct. 77, 81 (2000), quoting Fechtor v. Fechter, 26 Mass. App. Ct. 859, 861 (1989). When reviewing a division of marital assets, we examine the trial court's "findings to determine whether [the judge] considered all the relevant factors under § 34." Baccanti v. Morton, 434 Mass. 787, 790 (2001). "A division of marital property which is supported by findings as to the required factors will not be disturbed on appeal unless 'plainly wrong and excessive.'" Passemato v. Passemato, 427 Mass. 52, 57 (1998), quoting Heins v. Ledis, 422 Mass. 477, 481 (1996).

The wife principally challenges the judge's finding that she received a "substantial offset" for the husband's pension, as documents submitted at the nonevidentiary remand hearing established that her three retirement accounts were collectively valued at only \$377,800, while the husband's pension was valued

at \$1,419,629. However, the appraisal purportedly establishing the value of the husband's pension at \$1,419,629, which the husband contests, was not properly before the judge in the Probate and Family Court. Accordingly, it is not part of the record on appeal and we do not consider it. See Coonce v. Coonce, 356 Mass. 690, 693 (1970) ("[T]his court, upon appeal, is precluded from considering matters that do not appear from the record to have been before the trial court" [citation omitted]).³ There is no indication that the wife sought to reopen the evidence on remand, and it is undisputed that she did not introduce evidence regarding the value of the husband's pension during the divorce trial.⁴ See Moriarty v. Stone, 41 Mass. App. Ct. 151, 154 (1996) (property values generally

³ In October 2018, a different judge of the Probate and Family Court granted the husband's motion to strike the inclusion of the contested appraisal in the record appendix, see Mass. R. A. P. 18 (b), as amended, 425 Mass. 1602 (1997). (The current version of this rule now appears at 481 Mass. 1637 [2019].) The appraisal is, accordingly, not included in the record appendix, was not referenced in the judge's findings, and the wife did not request that the judge reopen the evidence on remand. See Marnerakis v. Phillips, Silver, Talman, Aframe & Sinrich, P.C., 445 Mass. 1027, 1028 n.5 (2006) ("We . . . do not rely on factual statements contained in any party's brief that are not properly supported in the record appendix").

⁴ It appears that, during the divorce trial, the wife sought to retain her three retirement plans as an offset for the husband's pension, i.e., the same disposition ultimately ordered by the judge on remand. To the extent the wife changed her position based on an appraisal she obtained long after the close of evidence, we think the "issue was not raised below in a manner that was fair to [the husband]." Perseus of N.E., MA, Inc. v. Commonwealth, 429 Mass. 163, 168 (1999).

determined as of date of divorce trial). We therefore cannot fault the judge for failing to consider an appraisal that was never entered in evidence.⁵ See Putnam v. Putnam, 7 Mass. App. Ct. 672, 674 (1979) ("when parties decline to offer evidence on [the G. L. c. 208, § 34,] factors . . . consideration of the factors thereby omitted can properly be deemed waived"). Indeed, even if the appraisal had been entered in evidence, the judge was not required to adopt the opinion of value set forth therein. See Fechtor, 26 Mass. App. Ct. at 863.

Moreover, the value of the husband's pension was but one of many factors that the judge was required to consider when redistributing the marital estate. See G. L. c. 208, § 34.⁶ In assigning the husband the entirety of his pension, the judge explicitly considered the husband's contribution of \$116,650 to

⁵ The wife suggests that the judge should have considered the appraisal of the husband's pension because the judge relied on other contemporaneously submitted documents to determine the values of the wife's retirement assets on remand. However, the values of the wife's retirement assets were not contested on remand.

⁶ "In fixing the nature and value of the property, if any, to be so assigned, the court . . . shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, the opportunity of each for future acquisition of capital assets and income, and the amount and duration of alimony, if any The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit." G. L. c. 208, § 34.

fund the parties' 2012 move. See G. L. c. 208, § 34 (permitting judge to consider parties' respective contributions to marital enterprise). See also Heins, 422 Mass. at 484 (approving award of larger share of marital estate to reimburse spouse for making "greater proportional investment" in parties' joint business); Braun v. Braun, 68 Mass. App. Ct. 846, 855 (2007) (affirming reimbursement to spouse for expenses incurred in connection with marital property). The judge considered the fact that assigning the pension to the husband would relieve the wife of an alimony obligation. See G. L. c. 208, § 34 (requiring judge to consider, for purposes of property division, "the amount and duration of alimony, if any, [to be] awarded," and authorizing judge to assign marital property to either spouse "in lieu of" alimony).⁷ See also Casey v. Casey, 79 Mass. App. Ct. 623, 630 (2011) ("Alimony and equitable division are interrelated remedies; the combination must make sense" [citation omitted]). The judge also implicitly considered the wife's superior earning capacity, as reflected in his findings accompanying the divorce

⁷ Excluding the husband's pension income from the alimony calculation to avoid potentially inequitable "double dipping," Champion v. Champion, 54 Mass. App. Ct. 215, 219 (2002), the husband could be eligible for a weekly alimony award of up to \$174 (thirty-five percent of the difference between the parties' gross incomes). See G. L. c. 208, § 53 (b). The judge was therefore within his discretion to assign a larger share of the marital estate to the husband in lieu of alimony. See G. L. c. 208, § 34.

judgment.⁸ See G. L. c. 208, § 34 (requiring judge to consider each party's "amount and sources of income, . . . employability, . . . [and] opportunity . . . for future acquisition of capital assets and income"). "The weight to be accorded to each of the § 34 factors in a particular case is committed to the judge," Ross v. Ross, 385 Mass. 30, 37 (1982), quoting Langerman v. Langerman, 9 Mass. App. Ct. 869, 870 (1980), and we discern no abuse of discretion in the judge's weighing of the relevant § 34 factors here.

We also discern no merit in the wife's contention that the disparity in the parties' respective financial circumstances "continues unabated" as a result of the amended judgment. As the panel observed in the prior appeal, the divorce judgment left the husband with a weekly net surplus of \$741 after deducting his expenses from all income sources (including his pension, attributed income, and child support from the wife), while the wife was left with a weekly net deficit of \$320. We concluded that the \$1,061 delta resulting from the divorce judgment placed the husband in a far superior financial position

⁸ In the rationale accompanying the divorce judgment, which the judge specifically ratified in the amended judgment, the judge found that the wife was employed full time earning \$60,840 annually, while the husband, who was unemployed and possibly suffering from posttraumatic stress disorder, was only capable of "some work," earning in the "minimal range of \$35,000 per year." See Allen v. Allen, 89 Mass. App. Ct. 403, 405 n.3 (2016) ("we may take judicial notice of court records in a related proceeding").

compared to that of the wife because only the husband would be able to maintain his lifestyle after the divorce. See Letteri, 92 Mass. App. Ct. 1120. However, as noted by the judge in the amended judgment, the child support obligation has since shifted to the husband by agreement of the parties. As a result, the delta has been substantially narrowed, such that the parties are no longer left "in significantly disparate circumstances." Casey, 79 Mass. App. Ct. at 629.⁹

In sum, given the absence of evidence regarding the value of the husband's pension, and in light of the other § 34 factors weighed by the judge and the parties' relatively commensurate financial circumstances, we are satisfied that the inequity in the over-all financial disposition identified in the previous appeal no longer exists. See Grubert, 20 Mass. App. Ct. at 822 ("the financial arrangement as a whole must be equitable"). See also Cabot v. Cabot, 18 Mass. App. Ct. 903, 905 (1984) ("There is no requirement in G. L. c. 208, § 34, or cases under it, of precise parity in equitable division of marital assets"). Accordingly, on this record, we cannot say that the property

⁹ The delta between the parties' incomes is now only \$430, as the wife's weekly child support obligation of \$185 has been terminated and she now receives child support from the husband of \$130 per week. Accordingly, the husband now has a weekly net surplus of \$426 after deducting all expenses (including his reported deductions, weekly living expenses, and child support payments) from his income (pension and attributed), whereas the wife's weekly deficit has been essentially eliminated.

division was "plainly wrong and excessive." Passemato, 427 Mass. at 57, quoting Heins, 422 Mass. at 481.

Conclusion. The amended judgment is affirmed. The husband's motion to strike and for sanctions is denied. The husband's request for appellate attorney's fees is denied.

So ordered.

By the Court (Milkey,
Neyman & Englander, JJ.¹⁰),

Joseph F. Stanton

Clerk

Entered: July 15, 2019.

¹⁰ The panelists are listed in order of seniority.